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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 259

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - Petitioner,

versus

MARY RUTH SPARKS, - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

United States Court of Appeals for the Sixth Circuit.

WM. MARSHALL BULLITT,
Counsel for Petitioner.
Address: 1700 Ky. Home Life Bldg.,
Louisville, Ky.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

References and Statement under Rule 23-1(*a*) and (*b*).

Opinions Below: All are contained in the Record [see Rule 21-1 (*i*)]; *Sparks* v. *Western Union*,* 141 F. Sup. 328 [District Court, Brooks, J.; R. 14a-18a]; and *Western Union* v. *Sparks*, in the U. S. Court of Appeals (6th Cir.); not yet reported; No separate Opinion; Judgment only [R. 219a].

Grounds For Supreme Court's Jurisdiction: (*a*) **Date, and time of entry, of Judgment:** District Court, June 11, 1956 (R. 19a); C. A. 6th Cir. April 23, 1957 (R. 119a), and rehearing denied May 30, 1957 (R. 222a); (*b*) **Statutory Jurisdictional Authority:** 28 U. S. C. §1254(1) [62 Stat. p. 928, §1254(1); see Rule 19-1(b)]. This is a civil case, after rendition of judgment by the United States Court of Appeals (6th Cir.).

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*The petitioner, The Western Union Telegraph Company, is herein called "Western Union"; and the respondent, Mary Ruth Sparks, is herein called "Mrs. Sparks."

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Supreme Court of the United States

October Term, 1956

No. _____.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner,*

v.

MARY RUTH SPARKS, - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

The Western Union Telegraph Company [herein called Western Union] petitions for *Certiorari*[1] to review *Sparks* v. *Western Union*, 141 F. Sup. 328 (R. 14a-18a); *Western Union* v. *Sparks*, —— F. 2d —— [C. A. 6th; R. 219a], in which the United States Court of Appeals for the Sixth Circuit decided an important Kentucky question in a way which is in direct conflict with the applicable plainly established Kentucky law [Rule 19-1 (*b*)].[2]

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[1]See inside cover page for References and Statement under Rule 23-1 (*a*) and (*b*).

[2]There is appended at p. 15, *infra* [as required by Rule 23-1-(j), Revised Rules of Supreme Court, p. 23], a copy of (**a**) the District Court's judgment and (**b**) the judgment of the Court of Appeals (6th) which, ***without opinion***, affirmed the District Court's judgment, review of which is sought.

Statement of the Case.

1. A 1906 Ordinance of Louisville, Ky.,[3] (*a*) Required Western Union (and other utilities) to remove its electric wires and cables from "*above* the surface" of the streets and to "place and maintain" them *under* the streets' surface; and (*b*) Authorized manholes in the streets, with covers on them, into the underground wires and cables (R. 87a-89a).

In 1927 Western Union installed on its authorized manhole (which it had built in 1909) in Louisville's Market Street, the authorized 250-pound circular cast-iron manhole Cover which this case involves (R. 198a-200a).

As highly explosive gases tend to accumulate in manholes, Western Union's manhole Cover had four "quarter-sized" Safety vent holes through it (R. 70a-72a, 109a-111a, 137a, 176a, 195a). Without those vent holes, a manhole "becomes a safety *hazard* on the streets of the city of Louisville" (R. 124a), and the "very highly explosive gases" "would blow the cover sky high in the air" (R. 200a-201a).

2. On March 8, 1954, Mary Ruth Sparks [herein called Mrs. Sparks], a part-time saleslady who was 45 years of age and on her way to work (R. 26a, 46a), wore ladies' shoes which had very slender 3 or 4-inch high heels, with "nickel-sized" heel taps (R. 29a; Plff's Ex. 1).

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[3]The Ordinance [7th Biennial Comp., Gen. Ord. of City of Louisville, 1907, pp. 832 *et seq.*] is Stipulated at R. 85a-99a.

Mrs. Sparks *knew* that **"all"** manhole covers "have holes in them" (R. 50a). Recently, she had walked across this same street where this same manhole Cover was located, "twice a day," "every day"—"at least a hundred times or more" (R. 26a-27a, 46a). It was broad daylight (R. 46a). She could see the vent holes in this Cover "more than four good steps," before she got to it (R. 47a-48a); but **she did not look,** or pay any attention to the Cover. She stepped on the Cover, stuck her "nickel-sized" heel tap in one of the Cover's "quarter-sized" Safety vent holes, fell forward and fractured her knee (R. 27a-30a).

3. For many years, Western Union has had 14,000 manholes (151 in Louisville alone) in busy streets in all large cities all over the United States, with 14,000 covers on them which have *identically* the same four "quarter-sized" Safety vent holes in the covers which are in the Cover upon which Mrs. Sparks fell (R. 197a-199a). Out of the millions of people who have walked over Western Union's 14,000 manholes (and their covers), Mrs. Sparks is the very *first* (and only) pedestrian who, so far as our careful research has disclosed, has ever sued Western Union (and, perhaps the only one who has ever been injured) anywhere in the United States, on account of any of those 14,000 identic manhole covers (R. 203a).

Other large public utilities (such as the Bell Telephone System), and cities and their agencies, for many years have maintained in busy streets in cities (including Louisville) all over the United States hun-

dreds of thousands of manholes which have covers on them that have from a few, to a great many, equally large "quarter-sized" open holes all the way through the covers (R. 67a, 69a, 70a, 81a, 111a-113a, 145a, 147a-150a, 172a, 175a, 183a, 184a, 197a, 199a). As far as reported Federal and State court cases show, out of the countless millions of people who have walked over the streets in which those *other* utilities' manholes are located, no pedestrian, at any time, anywhere in the United States, has ever been injured by catching his or her shoe heel in any of the holes in any of those *other* utilities' hundreds of thousands of manhole covers.

As far as the reported cases show, no Federal court, and no State court, anywhere in the United States, at any time, has ever before held that it was negligent to have in any street or walkway anywhere in the United States, a manhole cover with vent holes through the cover, in which any pedestrian has ever been injured by catching his or her shoe heel in one of those holes.

4. In Mrs. Sparks' suit for damages[4] the District Court (1) Denied Western Union's Motion that it *direct* a verdict in Western Union's favor upon the grounds that the evidence (*a*) failed to show any negligence on Western Union's part and (*b*) showed Mrs.

[4]The District Court's jurisdiction was based upon Western Union's removal of the suit from the Kentucky state court to Federal court (pursuant to Title 28, U.S.C., §§ 1441 *et seq.*), upon the ground of diversity of citizenship, Mrs. Sparks being a Kentucky citizen and Western Union a New York corporation and citizen (R. 1a).

Sparks' contributory negligence as a matter of law (R. 10a-11a); (2) Overruled Western Union's Motions to enter Judgment in its favor, or for a new trial (R. 10a-13a; Memorandum Opinion, 141 F. Sup. 328, R. 14a-18a); and (3) Entered Judgment on the Jury's $18,000 Verdict for Mrs. Sparks (R. 19a).

The Court of Appeals (6th Cir.), **without** writing any Opinion of its own, affirmed the District Court's Judgment and denied Western Union's Petition for rehearing (R. 222a).

The Questions Presented.

I. Under the Kentucky law that it is **not** negligent for one to use or maintains a *physical* "thing" or "instrument" that is in "*common* use":

Can Western Union be liable, upon grounds of negligence, for Mrs. Sparks' injuries from falling when she caught her high shoe heel, with a "nickel-sized" heel tap, in one of the four "quarter-sized" Safety vent holes in Western Union's cast-iron manhole Cover (in a Louisville, Ky. street) where, for many years, manhole covers with those "quarter-sized" vent holes through them have been in "*common use*" in Louisville and all over the United States?

II. Under the Kentucky law that a woman who, with knowledge of an alleged defective condition in a walkway, fails to look where she is going, and falls and hurts herself, is **herself,** guilty of *contributory* negligence as a matter of law (which, under Kentucky law, bars recovery):

Was Mrs. Sparks guilty of *contributory* negligence as a matter of law when, with absolute knowledge that all manhole covers have holes through the covers, she, *without looking where she was going*, in broad daylight, stepped on Western Union's perfectly visible manhole Cover in a Louisville, Ky. street with her "nickel-sized" heel taps, caught one of them in a "quarter-sized" vent hole in the Cover, and fell and hurt herself?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First.

The C.A. (6th) decided the case in a way which, in *two* respects, is directly contrary to the applicable and plainly established Kentucky law.

Under *Erie Railroad* v. *Tompkins*[5] the Kentucky law of negligence must be applied, as Mrs. Sparks' injury and the events leading up to it occurred in Kentucky.

I. Under Kentucky law, Western Union could not be found negligent.

1. This type of manhole Cover, upon which Mrs. Sparks fell, with its four "quarter-sized" Safety vent holes through the Cover, has been in "*common use*" for many years in Louisville and other cities all over the United States.

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[5]304 U. S. 64.

The plain fact is that vented manhole covers do not present any measurable risk of injury to pedestrians. If this were not so, there would be more manhole cases of the sort here concerned. It is probable that the footgear worn by Mrs. Sparks was unsuitable for use by pedestrians in city streets. It appears that the risk of injury to Mrs. Sparks, in this case, was self-created, and she did not guard against it, or even attempt to do so, as other ladies who choose to wear such footgear when walking in the city streets no doubt do. Under Kentucky law, it was egregious error to submit the case to the Jury, since, as matters of Kentucky law, Mrs. Sparks was negligent and Western Union was not.[6]

This Cover, with those vent holes, is a standard type, which (*a*) Is *identical* to all of Western Union's own 14,000 manhole covers in its own nationwide use since 1921 (R. 50a, 197a-200a); (*b*) Conforms to the 4,531 other manhole covers in the streets of Louisville alone, which belong to various utilities;[7] and (*c*) Con-

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[6]In *McQuillan* v. *City of New Orleans*, 18 So. 2d (La.) 218 (1944), the Court, in reversing a judgment for the plaintiff, a lady who caught her shoe heel in a sidewalk metal grating, aptly said:

> "When this grating was installed fifteen years ago the style in women's shoes might have been different and, doubtless, will be different before many years hence. It may be that our women will wear sturdier and wider shoes or it is as safe to predict narrower and flimsier ones. But must our sidewalks be altered with the prevailing mode of footgear or should the women be charged with greater or less caution as the changing styles require. We incline to the *latter* view and are constrained to hold this sidewalk is reasonably safe for the pedestrian who is reasonably shod" (p. 220).

[7]Southern Bell, 1,380 covers (R. 145a, 147a-148a, 150a); Louisville Water Co., 2,000 covers (R. 107a); Louisville Gas & Electric Co., 1,000 covers (R. 67a, 69a, 70a, 81a, 172a, 175a, 183a-184a, 199a); Western Union, 151 covers (R. 197a).

forms to the standard specifications—"which show four vent holes in the cover designs"—that American Standards Association's Committee has established for manhole covers for use throughout the country (R. 190a-191a, 193a, 198a-199a).[8]

2. That widespread "common use" of these Safety vent holes through manhole covers brings this case *directly within* Kentucky's clearly established law—which both the District court and the C.A. (6th) failed to apply—that it is *not* a negligent act for one to use or maintain a physical "thing" or "instrument" which is in "*common use*".

In *Greater Louisville 1st Fed. Sav. & Loan Assn. v. Stone*, 242 S. W. 2d (Ky.) 739 (1951), a child (too young to be chargeable with contributory negligence) severely burned his hand on an uninsulated hot radiator pipe in the Loan Association's office. The Kentucky Court held that there must be a *directed* verdict for the Association, under Kentucky's "common use" rule. It stated and applied that rule, saying:

> "In the instant case, an uncovered radiator pipe is a **thing in common use.** It is a matter of common knowledge that uninsulated radiator pipes exist *everywhere*. There is no difference in principle between an exposed radiator pipe and an unguarded hot *coal stove*. * * * No one would

[8] This Cover's vent holes are "conservative" as to number and size, in comparison with the holes in manhole covers which other utilities use "throughout the entire United States". In New York City, the Power Company's 18,000 covers for its manholes for its primary cables (and the countless thousands for its secondary cables) all have 24 vent holes in each cover, 1½ inches in diameter (R. 201a-202a).

assume, or even argue, that a country merchant would be liable to a child that came into his store and received a burn by touching a red hot stove. With reference to radiators, and likewise with hot stoves, the practice of not covering or guarding them is so *usual and widespread* that no property owner should be held to anticipate that an injury would ever occur by reason of the existence of such a *commonplace* condition."

The Kentucky Court stated the standard which must be applied, saying:

"We *cannot* read into this case positive, active negligence upon the part of appellant. The care taken by people generally to prevent injury from **instruments of common use,** is the proper criterion for courts to consider in determining what constitutes *due care* with respect to the use of such instruments. An uncovered radiator pipe is an instrument in **common use,** and it is a *standard,* approved practice to leave radiator pipes exposed. Therefore, having and keeping radiator pipes uncovered in a building, is *not* a negligent act upon the part of the possessor of property."

The Kentucky Court reaffirmed its earlier statement of the "common use" rule in *Haar v. Vogelman Bakery Co.,* 312 Ky. 307 (1950), which involved an ordinary gasoline filling station spouted can, as follows:

"The care taken by people *generally* to prevent injury from articles in **common use** is a proper guide for the courts in determining what constitutes *due care* in respect to such articles. The law does *not* exact a degree of care regarding

> any article which will make the great majority of the possessors of that article chargeable with habital or continuous negligence."

In *Ellis* v. *L. & N. R. Co.*, 251 S. W. 2d (Ky.) 577 (1952), the Kentucky Court, in referring to that rule of law, approved this statement of it:

> "Persons who are charged with a duty in relation to a particular matter or *thing* have a *right to rely* upon the sufficiency of a structure or contrivance which is in **common use** for the purpose and has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose."

In *McNeal* v. *City of Louisville*, 287 Ky. 83 (1941), where Mrs. McNeal, at night, caught her high shoe heel in a hole in an ordinary cover that was over a catch basin which was located at a busy street intersection, the Kentucky Court affirmed a *directed* verdict against Mrs. McNeal, saying that:

> "* * * the mere fact that plaintiff's shoe *heel* caught in the catch basin is *no* evidence of negligent construction or negligent maintenance of the catch basin in question * * *."[9]

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[9]The District Court's Opinion (which the C.A. adopted, R. 219a), asserts as the reason for not applying Kentucky's "common use" rule, that there was evidence that Louisville Gas & Electric Co. had followed a practice of dropping small removable rivets in the vent holes in some of its manhole covers (R. 17a-18a). The reason which the District Court assigned is completely *erroneous*, upon *two* grounds:

First: Kentucky's "common use" rule does *not* require that the "thing" or "instrument" in question be used universally,

(*Footnote continued on next page*)

II. Under Kentucky law, Mrs. Sparks was guilty of contributory negligence as a matter of law.[10]

1. Mrs. Sparks *knew* she was wearing high-heeled shoes, with "nickel-sized" heel taps; *knew* that "all" manhole covers "have holes in them"; *recently* had walked across this same street at this same place "at least a hundred times or more"; and could *clearly see* the vent holes in this Cover "more than four good steps" before she got to it, if she had looked (p. 2-3, *supra*).

2. The Kentucky law is that her failure to look makes her guilty of contributory negligence as a matter of law.

In *Interstate Coal Co.* v. *Deaton*, 148 Ky. 160—which the court reaffirmed in 1954 in *Cardwell* v. *Haycraft*, 268 S. W. 2d (Ky.) 916—the Kentucky Court held that Deaton was guilty of *contributory* negligence as a matter of law, where he failed to look out for the perfectly visible condition which caused his injury. It said:

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without exception; but only requires that it be in "general" or "common" use. For instance, in *City of Louisville* v. *Moore*, 267 Ky. 536 (1937)—another catch basin cover case—the particular cover in which Moore caught his shoe heel was an "old type" which, 16 years before, the City had abandoned for a "new type", but it still had 1,737 "old type" catch basins in use.

Second: The District Court completely *overlooked*, and did not mention, the uncontradicted evidence that Louisville Gas & Electric's practice of stopping up vent holes in some of its covers, with the removable rivets, simply meant (as Louisville Gas & Electric's engineer himself testified) that it was "*simply taking a greater risk of explosions*" (R. 71a-72a).

[10]The District Court's Opinion [which the C.A. (6th) adopted], completely ignored, and did not even mention, the uncontradicted evidence of Mrs. Sparks' contributory negligence (R. 14a-18a).

> "He *must* know those things which are *right before his eyes,* and which he himself admits having seen."

In *Crain* v. *City of Louisville,* 259 S. W. 2d (Ky.) 52 (1953), the Kentucky Court held that Mrs. Crain was **guilty of contributory negligence as a matter of law,** when she caught her foot and fell (at night) on a defective sidewalk, which she knew about, but to which she "never gave a thought" as she walked along with a companion. The Court pointed out that "one who walks over such a street with knowledge of its condition" must exercise care for "his own safety"; and **expressly overruled** all of its earlier decisions to the contrary, saying:

> "Mrs. Crain was fully *aware* of the defective condition of the sidewalk, and we do *not* think that she should be excused from **contributory** negligence by saying that she *never gave a thought* to the defect as she was walking along the street with Miss Pence. Those cases where there has been a contrary ruling, when the injured person had full knowledge of the defect in the sidewalk, are hereby **overruled.**"[11]

[11]Among the earlier cases which were thus *overruled,* are *Monroe* v. *City of Louisville,* 278 Ky. 648 (1939) and *City of Louisville* v. *Verst,* 308 Ky. 46 (1948), upon which Mrs. Sparks has always relied.

Second.

The decision of this Kentucky Question is *important;* because, the unique and unprecedented decision of the Court of Appeals *jeopardizes* the future use of Safety vent holes in manhole covers.

The uncontradicted evidence is that explosive gases (which also are deadly to workmen) tend to accumulate in manholes. Unless manholes are vented, those gases give rise to dangers of explosions and fires. An unvented manhole "becomes a safety hazard on the streets" (R. 70a-72a, 109a-111a, 124a, 137a, 176a, 195a).

If this C.A. decision stands, (1) All utilities and cities which have to have manholes will stand convicted in advance of "habitual or continuous negligence"—a burden which the Kentucky Court rejects (p. 9-10, *supra*); or (2) They must abandon use of Safety vent holes in manhole covers and thus subject all large cities to the grave hazards of explosions.

As far as reported cases show, *never* has *any* court anywhere ever before allowed recovery to anybody for an injury from catching a shoe heel in a manhole cover's vent holes; and as far as our research has disclosed, *never* before has *anyone* brought suit seeking recovery for such an injury.

The implications of the decisions of the District Court and Court of Appeals (6th) go far beyond the $18,000 amount of this Judgment. They *jeopardize*

safety precautions which, for *fifty* years, have been *imperative* everywhere.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

June 21, 1957.

Certificate of Service.

I, Wm. Marshall Bullitt, counsel for The Western Union Telegraph Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 9, 1957, I served the foregoing Petition for Writ of Certiorari on the respondent, Mary Ruth Sparks, by that day depositing a copy thereof in a United States post office in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, John P. Sandidge, Esq., at 1805 Ky. Home Life Building, Louisville, Ky.

WM. MARSHALL BULLITT,
Counsel for The Western Union Telegraph Company,
1700 Ky. Home Life Building,
Louisville, Ky.

APPENDIX

Judgment of District Court [Brooks, J.]
[Entered June 11, 1956]

The jury having returned its verdict awarding plaintiff $18,000.00 against defendant,

It Is Now Ordered and Adjudged that plaintiff, Mary Ruth Sparks, recover of defendant, Western Union Telegraph Company, $18,000.00 with interest thereon at 6% from this date until paid, together with her costs herein, for all of which she may have execution.

Judgment of the U. S. Court of Appeals [6th Cir.]
[Entered April 23, 1957]

The above cause coming on to be heard upon the record, the briefs of the parties, and the arguments of counsel in open court; and it appearing that the jury's award of damages was not excessive; that the instructions given by the district court to the jury properly placed before it the issues in the case, when considered as a whole; and the court being duly advised.

Now therefore, it is Ordered, Adjudged and Decreed that the judgment of the district court be affirmed, on the opinion of Judge Brooks overruling appellant's motion to set aside the verdict of the jury and to enter judgment in accordance with appellant's motion for a directed verdict, as reported in 141 F. Supp. 328, which is hereby adopted as the opinion of this court.

Order of U. S. Court of Appeals [6th Cir.] Denying Rehearing
[Entered May 30, 1957]

The petition for rehearing is denied.